United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1127

DOCKET NO. 75-5

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF:

SALVATORE BONITO, A Grand Jury Witness, Docket No. 75-

On Appeal from the United States District Court for the Western District of New York

BRIEF OF GRAND JURY WITNESS-APPELLANT

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PRELIMINARY STATEMENT

SALVATOR BONITO appeals from Orders of the Hon. John T. Curtin, United States District Court Judge for the Western District of New York, entered March 28, 1975, remanding him to the custody of the United States Marshall, pursuant to the "recalcitrant witness" statute, 18 U.S.C. §1826, for his refusal to answer certain questions put to him by a Department of Justice Attorney before the Grand Jury, after Judge Curtin had granted him immunity pursuant to 18 U.S.C. §6006 and §6003.

In refusing to answer the questions put to him before the Grand Jury, the Appellant invoked his rights under, inter alia, the First and Fourth Amendments to the Constitution. In particular, the Appellant asserted, and at the hearing on the contempt charges presented evidence, that their being compelled to answer the questions put to them would violate their rights to freedom of speech and to associational privacy under the First Amendment and that the calling of Appellant before the Grand Jury had already infringed on those rights, in that the private social clubs, duly chartered Not-for-Profit Corporations, to which they belong (and of one of which Appellant Joseph Buscaglia was Secretary-Treasurer) had ceased operating due to the

Grand Jury subpoenas of these witnesses and the questions being asked of them.

The Appellant also made claims, pusuant to 18 U.S.C. §3504, that the questions they were asked were the result of unlawful electronic surveillance. The Government responded by affidavit, denying that Appellant's residence telephones had been tapped. However, these affidavits did not deny that the social clubs in question had been subjected to electronic surveillance, but only alleged in a conclusory fashion that each Appellant had not been identified as one overheard by any form of electronic surveillance.

On March 4, 1975, the Court and Government counsel had an in camera conference, the transcript of which was sealed until March 14, 1975, after the Orders herein appealed from in the cases of Buscaglia and Bona were entered. At that conference, Government counsel made a statement, not under oath and without stating what files had been search, that "there is not and there have been no wire taps".

QUESTIONS PRESENTED

(1) Whether the Government's response to Appellant's claims of unlawful electronic surveillance was sufficient, under 18 U.S.C. §3504, for the protection of Appellant's rights not to be compelled to answer questions derived from such unlawful electronic surveillance?

(2) Whether, in light of the evidence that Appellant's rights of freedom of speech and associational privacy were

infringed in the Grand Jury proceeding, Appellant could validly be held in civil contempt pursuant to 18 U.S.C. §1826.

STATUTES INVOLVED

18 U.S.C. §3504.

> (a) In any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency regulatory body, or other authority of the United States--
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;....
>
> (b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

18 U.S.C. §2510.

> (5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than--
>
> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;
>
> (b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal

18 U.S.C. §2515

> Whenever any wire or oral communication has been intercepted, nor part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

STATEMENT OF FACTS

The appellant herein was served with a subpoena requiring him to appear as witness before a Federal Grand Jury epaneled in Buffalo, New York. This Grand Jury was, according to Governement applications for immunity for this witness, investigating possible violations of Sections 1955, 892-94, and 1962 of Title 18 United States Code. In later affidavits submitted by the Government in each of these cases, in Paragraph 2 thereof the Government referred to "the investigation of the activities occurring at Nairy's Social Club and the Connecticut Social Club in Buffalo, New York".

The affidavit by Appellant Buscaglia, included the following paragraphs:

> 3. Until the Grand Jury investigation and the subpoenaing of many of our club

> members, the social club was a thriving organization with members constantly about, exchanging ideas, associating with one another and having conversations concerning politics, the affirs of the day, and other matters.
>
> 4. Since the Grand Jury investigation began in this case and many of our members were subpoenaed, the club has been totally shut down as not one person dares to enter the club to associate with any of the members.
>
> 5. Thus, the free exercise of the first amendments freedom of association has thoroughly chilled and brought to a grinding halt by the activity of the Government's Grand Jury Investigation.

Annexed to this Affidavit was a copy of the Certificate of Incorportion of the club under the Not-for-Profit Corporation Law of the State of New York, which included the following as a part of its statement of purpose:

> To promote fellowship and extend acquaintanceship by means of social gatherings and lectures; to promote social intercourse among the members by means of dances, dinners, musicals, and other forms of entertainment; to engage generally in any causes or objects similar to the above mentioned in order to promote the cultural, social, literary and mental welfare of the members; and to promote brotherhood and sociability among its members, to hold and conduct social meetings, excursions and entertainments for its members, to promote the welfare of its members morally, educationally and fraternally.

Counsel for the Government did not dispute the truth of Buscaglia's affidavit.

The cases of the Appellants, Panaro, Bona, Mambrino, Oliver and Bonito are esentially similar, and counsel for all Appellants joined in each others' motions and arguments.

Appellant Bonito was called before the Grand Jury on February 20, 1975, but because of illness was unable to testify. After appointment of counsel, on March 6, 1975, he was called back before the Grand Jury and same day and refused to testify. On March 20, 1975, after argument, the Court ordered Bonito remanded to the custody of the United States Marshall.

On April 2, 1975, Judge Curtin ordered contempt proceedings against Bonito stayed in that Bonito had been taken to the hospital with an apparent cancer of the lungs.

EAch of the Appellants invoked his First and Fourth Amendment rights when he refused to testify. Each claimed that unlawful electronic surveillance had been used against him and, in each case, received a flat denial as to the Appellants' residence, but only an equivocal answer to whether he had been overheard at the social club he belongs to. The Government affidavit, in each case, said only that he had not been "identified" as one overheard, or that he had not been over heard. (App., Items 14 through 18, Paragraph 5 in each affidavit.)

POINT I

APPELLANTS MUST NOT BE HELD IN CONTEMPT WHEN THE ISSUE OF UNLAWFUL ELECTRONIC SURVEILLANCE HAS NOT BEEN RESOLVED BELOW: THE GOVERNMENT'S FAILURE TO DENY THE OCCURRENCE OF SUCH SURVEILLANCE AT APPELLANTS' SOCIAL CLUBS LEAVES OPEN THE POSSIBILITY THAT QUESTIONS ASKED THEM BEFORE THE GRAND JURY WERE DERIVED FROM SUCH SURVEILLANCE.

18 U.S.C. §2515 forbids the use in any Grand Jury proceeding of evidence derived from unlawful electronic surveillance. It is now well settled that a Grand Jury witness may not be held in custody pursuant to 18 U.S.C. §1826 Ia), when the questions he has refused to answer before the Grand Jury are derived from unlawful electronic surveillance. Gelbard vs. United States, 408 U.S. 41 (1972).

This Court has recently considered such a defense to civil contempt citations. In United States vs. Toscanino, 500 F. 2d 267 (2nd Cit. 1974), it was held that a mere assertion that unlawful electronic surveillance has been used against a party triggered the requirements of 18 U.S.C. §3504 that the Government affirm or deny the occurrence of unlawful surveillance against a party, and that this affirmation must be in

> affidavit form, indicating which Federal agencies had been checked and extending the denial not only to conversations of Toscanino but also to conversations of anyone else occurring on premises owned, leased or licensed by Toscanino.
> 500 F.2d 281

The Court, "in the absence of such sworn written representation", remanded for a hearing on the allegation of unlawful electronic surveillance.

In United States v. Grusse, No. 75-2029 (2d Cir. Feb. 27, 1975), Slip Opinion 2039, this Court held that an inadvertent insufficiency of the affidavit had been "cured when the Assistant [United States Attorney] testified before Judge

Newman". Slip Opinion at 2042 (Lombard, C. J. concurring) (emphasis added). Grusse apparently does not change the rule that the Government's denial of electronic surveillance must be under oath.

In the cases of this Appellant, the affidavit of the Government in response to Appellant's claims denied, with adequate specificity, that each Appellant's residence had been the subject of electronic surveillance. The affidavit however, neither affirm nor deny whether any electronic surveillance was conducted concerning the social club which Appellant frequented and in which he was a member. This refual to affirm or deny was made very clear in argument before Judge Curtin March 4, 1975, where the Department of Justice Attorney James Gresens declined to affirm or deny, even orally, whether any such electronic surveillance had taken place.

The denial of telephone taps and the conclusory statement that each Appellant "was not identified" in any electronic surveillance fails to speak to the issues hotly contested at oral argument below: whether oral conversations of Appellants were unlawfully intercepted by a "bug" in the social club, and whether the voices of Appellants were or were not correctly "identified" in the tapes or transcripts of those overheard conversations. It is not likely that each and every voice heard on such a bug would be identified, and correctly identified,

by government investigators, even if the recordings were of X-ray clarity, which is, of course, unlikely with this sort of device. There thus remains the possibility in the circumstances of this case and with the equivocation in the Government's affidavits, that such surveillance was undertaken and that questions aksed Appellants were derived from such surveillance. Without a square denial from the Government, Appellants in this Court simply do not know whether those premises were bugged.

Instead of affirming or denying by affidavit, the Government on March 4, 1975, stated to the Court, in camera "there is not and there has been no wire taps". It is submitted that the in camera response by the Government is defective in two ways.

First, Government Counsel's statement is not sworn. This Court, in Toscanino, supra, and Grusse, supra, has required sworn statements of denial, and the statements of the Department of Justice Attorney Gresens here did not measure up to that standard. Appellant is entitled, under these cases, to more protection against being compelled to answer questions derived from unlawful electronic surveillance, than they have received in the proceedings below.

Secondly, the statement does not indicate the basis of Mr. Gresens' knowledge. As was held in Toscanino, supra, the denial of electronic surveillance may not be

merely conclusory, but rather must indicate what Federal Agencies have been checked. At the very least, the denial must indicate that the Government attorney making the denial has checked with the relevant agency and that personnel of that agency have searched the relevant records for any indication of electronic surveillance of Appellant. Toscanino, supra, 500 F.2d at 281; Grusse, supra, Slip Opinion at 2042. See also United States v. Aloi, No. 72-1220 (2nd Cir. January 31, 1975), Slip Opinion 6057.

Nor does Mr. Gresens' in camera denial of the surveillance render the failure to follow the required formalities harmless error. Mr. Gressens is not the only government employee conducting this investigation. It may be presumed that information has passed among the various government personnel conducting this investigation, and to Mr. Gresens, without Mr. Gresens knowing the precise source of each item of information he or others might have used in formulating questions before the Grand Jury. It thus remains possible that Appellant's rights have been violated. Unraveling the source of these various items of information would, of course, require a lengthy and unwieldy hearing. Appellants do not here argue for such a hearing, but rather submit that the sworn, informed denial mandated by Section 3504 and by Toscanino, is precisely designed to avoid the necessity for such a hearing, and is the minimum protection that must be afforded Appellant's right.

It may be that the Government following an adequate search, can truthfully and fully deny under oath that any electronic surveillance of Appellants took place at their social clubs. But in this record there is simply no such adequate denial, and there remains the possibility that such surveillance had taken place. Appellants and this Court simply do not and cannot know, on this record. Because this possibility remains, the contempt order should be vacated.

POINT II

APPELLANTS' RIGHTS OF FREE SPEECH AND ASSOCIATIONAL PRIVACY ARE VIOLATED BY THE CONTEMPT CITATION.

It is axiomatic that speech and associational relationships are presumptively protected by the First Amendment, and that the burden rests with the Government which would infringe those rights to show a sufficient justification for its disruptive intervention. SEe Gooding v. Wilson, 405 U.S. 518 (1972); NAACP v. Alabama, 357 U.S. 449 (1957). In shouldering this burden, the Government must show both that its interests are legitimate and compeling, and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate the Governmental interest subordinating those rights. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). In re Stolar, 401 U.S. 23 (1971); Shelton v. Tucker, 364 U.S. 479 (1960). Barenblatt v. United States, 360 U.S. 109 (1958).

A. He gave me the same answer that I've given you.

In Bursey v. United States, supra, two witnesses were held in civil contempt for refusal to answer questions concerning their employment on a Black Panther newspaper, in which a report concerning threats on the life of the President had been circulated, where the Grand Jury was investigating possible violations of 18 U.S.C. §§871 (threats against the President), and 1751 (presidential assassination). The Court held:

> When the collision [between governmental activity and first amendment rights] occurs in the context of a Grand Jury investigation, the government's burden is not met unless it establishes that the government's interest in the subject matter of the investigation is "immediate, substantial and subordinating", that there is a "substantial connection" between the information it seeks to have the witness compeled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interests. The investigation must proceed "step by step... and an adequate foundation for inquiry must be laid before proceeding in such a manner as" may inhibit First Amendment freedoms. 466 F.2d at 1083, quoting Gibson v. Florida Legislative Investigation Commission, 372 U.S. 539 (1963).

In this case, there is undisputed evidence that the Grand Jury's inquiry here has not merely chilled, but utterly frozen, the Appellant's and others' rights of free and private association and discussion; that the social clubs in question have been shut down by the investigation and by the calling of these witnesses before the Grand Jury.

A heavy burden of justification must therefore be born by the Government to justify this deep intrusion into the Appellant's rights of free and private speech and association.

> When first amendment interests are at stake, the government must use a scapel, not an ax. Bursey v. United States, 466 F. 2d at 1088.

Appellants submit that the Government has not met its burden of showing that the legitimacy of its interest justify this intrusion, and that no less drastic intrusion could vindicate governmental interests; that the Government has proceeded not with a scalpel but with an ax, indeed with a chain saw and bulldozer, without showing the necessity for cutting such a broad swath through the rights of free speech and associational privacy of Appellants and evidence than the Government has shown here--no more than the questions themselves--before allowing those members and officers to be clapped in jail for incurring the displeasure of the prosecutors. Cf. People v. Doe, 35 A.D. 2d 178, 314 N.Y.S. 2d 5 (4th Dept. 1970).

The Court, with its overview of the Federal Criminal Justice System, in this circuit and with its experience of many cases brought by overzealous prosecutorial staffs, must ask itself whether two decades from now, history will judge the current assaults on citizens liberties, via the special grand juries, the broad utilization of "use" immunity, and such overpowering tools, to invade the precincts of privacy and discussion--all in the name of fighting "organized crime"--whether history will judge this spectable

as it now views the excesses of the McCarthy period of two decades ago. The Federal Courts are the ultimate guardians of our liberties against such excesses, and this Court must carefully scrutinize the actions of prosecutors when they proceed as here with such blunt instruments into the private lives of citizens.

CONCLUSIONS

For the reasons stated above, the adjudications of civil contempt should be reversed.

Respectfully submitted,

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